Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 75-139

JIMMY H. ROSE, Warden,
Tennessee State Penitentiary,
Petitioner

v.

ISADORE HODGES, JR. and
ANDREW LEWIS, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

JIMMY H. ROSE, Warden,
Tennessee State Penitentiary,
Petitioner

v.

ISADORE HODGES, JR. and
ANDREW LEWIS, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Attorney General of Tennessee, on behalf of Jimmy H. Rose, Warden, Tennessee State Penitentiary, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. A & B, *infra*, pp. 8-11) are not yet reported. The memorandum and order of the district court (App. C, *infra*, p. 12) are not reported. The direct appeal of the defendants in the Ten-

nessee Court of Criminal Appeals is reported as *Hodges v. State*, 491 S.W.2d 624 (1973).

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1975, and the petition to rehear was denied June 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the commutation by the Governor of Tennessee of the death sentences of the respondents was valid or whether the case should be remanded to the trial court for a new trial on the question of punishment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There were no constitutional provisions or statutes cited by the Sixth Circuit in reversing this case but we assume they relied upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

Tenn. Code Annot. § 16-451 provides in part as follows:

> "The Court of Criminal Appeals shall be a court of record, and its order and judgment shall have the same effect as the order and judgment of other courts of record and unless superseded, reversed, or modified by the Supreme Court, shall become final after

> the expiration of thirty (30) days from the entry of the order or judgment as herein defined and be executed by all necessary and proper writs."

STATEMENT

The two respondents were sentenced to death. While their case was on appeal this court decided *Furman v. Georgia*, 408 U.S. 238. The Tennessee Court of Criminal Appeals, in light of that case, vacated the death penalty and remanded the case for a new trial only on the issue of punishment. *Hodges v. State*, 491 S.W.2d 624 (Tenn.Crim.App. 1973). Eight days later the Governor of Tennessee commuted the appellants' sentences to ninety-nine years. The State then filed a petition to rehear which was granted by the Court of Criminal Appeals and that court said, *Hodges v. State*, *supra*, 491 S.W.2d at 629:

> "It is therefore ordered, adjudged and decreed that the request by the state in this petition is with merit. See Bowen v. State, supra. We therefore, in obedience to the mandate of our Supreme Court under the authority delineated, reconsider the remand for punishment aspect of our opinion and for naught it is held. The judgment is accordingly modified and affirmed in compliance with the executive order of commutation as entered."

The two defendants filed a federal petition for habeas corpus which was dismissed by the district judge (App. C & D). The Sixth Circuit reversed the action of the Court of Criminal Appeals saying:

> "Such commutation followed by some eight days an order of the Tennessee Court of Criminal Appeals vacating the order imposing the death penalty and re-

manding the case to the trial court for punishment determination in the light of Furman v. Georgia, 408 U.S. 238 (1971), and for the reason that there were therefore no viable death sentences to commute, we hold the purported commutation and the concomitant imposition of committed sentences for terms of 99 years invalid." App. 10-11.

A petition to rehear was filed in the Sixth Circuit pointing out that on the very same set of facts that court in *Smith v. Rose*, *supra* (App. E), had reached the opposite conclusion, the court saying:

"We find that no federal constitutional issue is involved . . ."

The Sixth Circuit opinion on the petition to rehear failed to mention the fact that the opinion in this case was directly opposed to its opinion in the earlier case of *Smith v. Rose*, *supra*. The Court of Appeals failed to mention in either its opinion or its order on the petition to rehear any federal constitutional ground for its reversal of the district court.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has rendered a decision in conflict with a previous decision in that court on the same matter and has decided an important state question involving state criminal procedures in a way in conflict with state law where no federal question is involved.

There is nothing in the record to support the Sixth Circuit's view of the facts except the unanswered allegations of the petition and the "findings" of the District Court based on the unanswered petition. The state record was not before the District Court. The issue decided was

precluded by the District Court's statement of the issues in its show-cause order. The true facts are that the Tennessee Court of Criminal Appeals did remand the appellants' case for determination of penalty after the death penalty was declared unconstitutional. This opinion was filed on July 31, 1972. On August 7, 1972, the Governor of Tennessee commuted the sentences from death to 99 years imprisonment. On August 8, 1972, the state filed a timely petition for rehearing in the Court of Criminal Appeals. In an opinion filed January 12, 1973, the Court of Criminal Appeals modified and affirmed the convictions, recognizing that (a) their decision vacating the judgments had not been final at the time of commutation and (b) that the commutation was well within the powers of the Governor of Tennessee. The conviction, as modified by the commutation, was then affirmed by the Tennessee Court of Criminal Appeals. Hodges and Lewis then petitioned for certiorari to the Tennessee Supreme Court which petition was denied. Except for these proceedings the commutation issue has never been challenged. *Hodges v. State*, *supra*. The question decided has never been presented to the state courts in this form.

The facts in the Ronald Ray Smith case (App. E),[1] decided by the Sixth Circuit on November 15, 1974, are identical. In its first opinion, the Court of Criminal Appeals affirmed Smith's conviction of murder in the first degree and remanded the case to the Williamson County Court for a new jury to impose a punishment in reliance on *Furman v. Georgia*. Subsequently the Governor of Tennessee issued an order commuting Smith's sentence to 99 years in prison. The state then filed a timely petition to rehear. The Court of Criminal Appeals then reconsidered and modified its decision. This result was challenged by habeas corpus on the same ground suppos-

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[1] The District Court's opinion is included as App. F (**infra**, at p. 21).

edly asserted here. The Sixth Circuit Court's November 15, 1974 opinion states:

> "Upon full consideration we find no federal constitutional issue is involved and that the judgment of the district court dismissing the habeas corpus petition should be affirmed." (App. E)

The Court of Criminal Appeals decision was clearly not final. Tenn. Code Annot. § 16-451. The judgment was still in effect at the time of the commutation. But this question presents no federal question. In the proceedings below, all of the issues presented by the petition were resolved by the district court *before* the show-cause order issued. The answer dealt with the only issue remaining. Realizing the District Court had ruled incorrectly on the issue of whether or not the petitioners had exhausted their state remedies on some, at least, of the remaining issues, the Attorney General of Tennessee confessed error in the Sixth Circuit suggesting that the entire case should be remanded to the District Court for consideration of the remaining issues. The appellee's brief contained no reference to the commutation issue. The appellants' brief, in a throw-away paragraph on page 12, attempted to rely on *Furman v. Georgia* and stated that any commutation of the Governor after the date of that decision denied the petitioners "due process of law."

The precise question raised by the appellants' brief has long since been decided in *Bowen v. State*, 480 S.W.2d 373 (Tenn. 1972).[2] See also *Eaton v. Capps*, 480 F.2d 1021 (5th Cir. 1973); *Henninger v. Wainwright*, 467 F.2d 217 (5th Cir. 1973); *Cherry v. Texas*, 361 F. Supp. 1284 (S.D. Texas 1972). But the opinion of the Tennessee Court of Criminal Appeals on the petition to rehear in this case speaks for itself. It is the law of this case. The

[2] Appendices G and H, Bowen's Federal Habeas Corpus, show that the district and appellate court considered a challenge to the Governor's commutation power as "frivolous."

suggestion that the courts of Tennessee are somehow unable to enforce their own orders is surprising. But if such is the case, it has never been alleged. The suggestion, adopted by the Court (though urged by neither side) that the commutation was ineffective because it came after the original opinion of the Court of Criminal Appeals but before the decision on the petition to rehear, and before the running of the time provided by T.C.A. § 16-451 has never been presented to the Tennessee Courts unless it was disposed of by the opinion on the petition to rehear. And if it has been presented, the state law question presented has been resolved in a manner contrary to the Sixth Circuit's earlier decision; if it has not been disposed of, this petition should be dismissed for failure to exhaust state remedies.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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July, 1975

APPENDIX A

[fol. 1] **NO. 74-1461**

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ISADORE HODGES, JR. and
ANDREW LEWIS, JR.
Appellants

v.

JIMMY H. ROSE, WARDEN
TENNESSEE STATE
PENITENTIARY
Appellee

FILED
JUN 10 1975
JOHN P. HEHMAN, Clerk

ORDER

Before: PECK and MILLER, Circuit Judges, and HERMANSDORFER, District Judge.*

This matter has come on to be considered upon a petition to reconsider the order of this court filed February 25, 1975, in the above styled case, which motion is found to be well taken and granted. As is stated in said order, five issues were presented for the consideration of the district court by appellants' petition for a writ of habeas corpus filed therein. The first challenges the validity of the commutation by the Governor of Tennessee of the sentences of death imposed upon appellants on their conviction of the crime of murder in the perpetration of rape. Such commutation followed by some days an order by the Tennessee Court of Criminal Appeals vacating the death

*Honorable Howard David Hermansdorfer, United States District Court for the Eastern District of Kentucky, sitting by designation.

penalty and remanding the case for punishment determination in the light of *Furman v. Georgia*, 408 U.S. 238 (1971).

Upon reconsideration, circumstances appear which were not developed during our earlier consid-
[fol. 2] eration from which it appears that the State of Tennessee filed a petition to rehear the case in the Court of Criminal Appeals, whereupon that court found the request by the State meritorious and modified its judgment to comply with the executive order of commutation. A petition for a writ of certiorari to the Supreme Court of Tennessee was filed on appellants' behalf, and the same was denied. Although Tennessee law provides appellants a further avenue of attack on their convictions under its post-conviction relief statute (T.C.A. § 40-3801 et seq.), it is clear that the failure to pursue this relief does not constitute a failure to exhaust state remedies where, as here, the issue was previously passed on by the Court of Criminal Appeals. *Johnson v. Russell*, 469 S.W.2d 511 (Tenn. Cr. App. 1971). We hold, therefore, that the district court erred in concluding that appellants had failed to exhaust state remedies in regard to this issue. In all other respects our order of February 25, 1975, is reaffirmed, but in view of our conclusion on reconsideration on the exhaustion of remedies issue,

IT IS ORDERED that the judgment of the district court be and it hereby is reversed, and the cause remanded for further proceedings consistent herewith.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

[fol. 1] **NO. 74-1461**

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ISADORE HODGES, JR. and
ANDREW LEWIS, JR.
Appellants

v.

JIMMY H. ROSE, WARDEN,
TENNESSEE STATE PENITENTIARY
Appellee

FILED
FEB 25 1975
JOHN P. HEHMAN,
Clerk

ORDER

Before: PECK and MILLER, Circuit Judges, and HERMANSDORFER, District Judge.*

This matter has been submitted on the record on appeal and on the briefs and oral arguments of counsel for the parties, from which it appears that five issues were presented for the consideration of the district court by the petition for a writ of habeas corpus filed herein. The first challenges the validity of the commutation by the Governor of Tennessee of the sentences of death imposed upon petitioners on their conviction of the crime of murder in the perpetration of rape. Such commutation followed by some eight days an order of the Tennessee Court of Criminal Appeals vacating the order imposing the death penalty and remanding the case to the trial court for punishment determination in the light of *Furman v. Georgia*,

*Honorable Howard David Hermansdorfer, United States District Court for the Eastern District of Kentucky, sitting by designation.

408 U.S. 238 (1971), and for the reason that there were therefore no viable death sentences to commute, we hold the purported commutation and the concomitant imposition of committed sentences for terms of 99 years invalid. A second issue arises from the fact that the jury did not in its verdict specify the degree of murder, but
[fol. 2] under Tennessee law the crime of murder in the first degree and the crime of murder in the perpetration of rape are legally equivalent, *Buchanan v. State*, 488 S.W.2d 724 (Tenn. 1973), and it is therefore concluded that this contention is without merit. In the remaining contentions petitioners argue that involuntary and coerced confessions were used against them during their trial, that they were denied due process by the Court's statement to the jury during the voir dire examination concerning the death penalty, and that the right to cross-examine witnesses was denied in violation of *Bruton v. United States*, 391 U.S. 123 (1968). We hold, and the respondent-appellee concedes, that the district court erred in concluding that petitioners had failed to exhaust their state remedies in regard to these three issues. Tennessee Code Annotated § 40-3811; *Arthur v. State*, 483 S.W.2d 95 (Tenn. 1972). Accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is reversed, and the cause remanded for further proceedings consistent herewith.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

ISADORE HODGES, JR., and ANDREW LEWIS, JR., Petitioners,

vs.

JIMMY H. ROSE, WARDEN, Tennessee State Penitentiary, Respondent.

FILED
FEB 28 1974
Clerk, U. S. Dist. Court
Western Dist. of Tenn.

No. C-73-442

ORDER DISMISSING PETITION FOR HABEAS CORPUS

The Court has previously dismissed four of the five grounds of alleged constitutional error for failure of petitioners to exhaust state remedies on those issues as is required by 28 U.S.C. §2254(b) and (c). Respondent has answered the only remaining ground of complaint by petitioner that the verdict and judgment in this case was unconstitutional because the jury did not specify the degree of murder in their verdict.[1] Respondent's position is that petitioners waived this issue or alleged defect by not

[1]The jury returned a verdict of guilty of "Murder in the Perpetration of Rape." T.C.A. 39-2404. Jury to ascertain degree. - The jury before whom the offender is tried, shall ascertain in their verdict whether it is murder in the first or second degree; and if the accused confess his guilt, the court shall proceed to determine the degree of crime by the verdict of a jury, upon the examination of testimony, and give sentence accordingly.

presenting it in their motion for new trial or on appeal; that no federal question has been presented and that the jury substantially complied with the requirements of T.C.A. §39-2404, citing *Buchanan v. State*, 488 S.W.2d 724 (Tenn. 1973).

The indictment charged that petitioners
[fol. 2] ". . . did feloniously kill and murder Pinkey S. Merritt in the perpetration of rape . . ." The Tennessee Code Annotated §39-2402 defines murder in the first degree in the following language: "Every murder perpetrated by means of poison, . . . or committed in the perpetration of, or attempt to perpetrate, . . . rape . . . is murder in the first degree."

Respondent has moved that the petition be dismissed without an evidentiary hearing. Petitioners moved for a clarification or rehearing with respect to the four grounds dismissed by order of November 15, 1973. Petitioners claim that it would be illogical and an unjustifiable hardship for them to be forced to exhaust state remedies on the four dismissed issues by going "back to the trial court" before applying for federal habeas corpus under 28 U.S.C. §2254.

Congress, however, has provided for federal habeas corpus relief available only in special circumstances for state prisoners. Congress intended the state courts to be the primary institution for state prisoners' habeas corpus applications. This scheme is reasonable and necessary under our federal system of government in the United States. Any "hardship" that petitioners claim they must endure is part of the statutory scheme, and available state remedies ***must be exhausted*** before the federal courts will entertain a state prisoner's application for habeas corpus.

Appendix C

In *Buchanan v. State*, *supra*, the Tennessee Supreme dealt with a similar situation where the jury had found the petitioner there "guilty of murder in the perpetration of a robbery," but failed to state in the verdict what degree of murder was involved. The Supreme Court concluded that the jury's verdict of murder in the perpetration of a robbery was equivalent to murder in the first degree.

[fol. 3] The Court accordingly dismisses the remaining alleged ground for habeas corpus relief without the necessity of a hearing.

The petition is dismissed at plaintiff-petitioners' cost.

This 25th day of February, 1974.

/s/ Harry W. Wellford
UNITED STATES DISTRICT COURT
JUDGE

APPENDIX D

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ISADORE HODGES, JR., and ANDREW LEWIS, JR.,
Petitioner,

vs.

JIMMY H. ROSE, Warden, Tennessee State Penitentiary,
Respondent.

FILED
NOV 15 1973
Clerk, U. S. Dist. Court
Western Dist. of Tenn.

No. C-73-442

ORDER TO SHOW CAUSE AND DISMISSING PETITION FOR HABEAS CORPUS (IN PART)

This is a petition for habeas corpus pursuant to 28 U.S.C. §2254. Petitioners are in state custody pursuant to a judgment of a state court. Petitioners allege five grounds of constitutional error occurring at their trial and in their appeals. (1) Petitioners aver that their fourteenth amendment rights were violated by the illegal commutation or modification of their sentences; (2) petitioners claim that involuntary and coerced confessions were used against them during their trial; (3) petitioners further claim that the verdict and judgment in their case was unconstitutional because the jury did not specify the degree of murder in their verdict as required by T.C.A. §39-2404; (4) they claim to have been denied a fair and impartial trial by the Court's statement to the jury concerning the death penalty during voir dire; and (5) finally, petitioner Hodges avers that he

was denied a fair trial because during the cross-examination of co-defendant Lewis relating to his out of court confession, the prosecutor mentioned co-defendant Hodges' name, and Hodges himself did not testify. The Court notes, [fol. 2] in passing, that if there were a *Bruton*[1] impropriety here, only Hodges has standing to raise the issue, and Lewis is not affected. Petitioners state they have complied with the requirements of 28 U.S.C. §2254 because they have exhausted available state remedies. Defendant Hodges raised the question on appeal as to prejudice by not being allowed to plead guilty and the failure to grant him a severance. In addition, the Court of Criminal Appeals on appeal dealt with an illegal search question, the constitutionality of the death sentence, and the Court's statement to the jury on voir dire about the death sentence if there were no mitigating circumstances. The Court of Criminal Appeals found no merit in any of the assignments of error except the one relating to the death sentence by reason of the Supreme Court's intervening decision in *Furman v. Georgia*, 408 U.S. 238 (1972).[2] The Court of Criminal Appeals on rehearing modified and affirmed their judgment in compliance with the Governor's Executive Order of commutation (certiorari denied by the Tennessee Supreme Court). Petitioners allege that their petition for post-conviction relief raising the single issue of the jury's failure to specify the degree of the verdict as required by T.C.A. §39-2404 was denied.

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[1] **Bruton v. U.S.**, 391 U.S. 123 (1968).

[2] The case was remanded to the trial court for a determination of punishment in light of **Furman, supra.** Shortly thereafter, the Governor commuted the sentences of the petitioners to terms of ninety-nine years imprisonment.

Petitioners assert there was an "agreed stipulation" which would make an appeal to Tennessee appellate courts a futile and useless gesture on this point.

In an independent investigation by this Court, such a purported stipulation was denied and any author- [fol. 3] ity to make such an agreement by a State District Attorney would be very questionable.[3] In accordance with Section 2254[4] and the principles of federal-state comity that underlie it, petitioners have not, in fact, exhausted their available state remedies on the commutation and coerced confession issues. Furthermore, the issues relating to the trial Court's remarks to the jury on voir dire and the alleged improper cross-examination of Lewis, although raised on appeal to the Tennessee Court of Criminal Appeals, were not presented in the post-conviction relief application that petitioners filed. Petitioners have therefore not exhausted available state remedies on these issues raised in this federal habeas corpus application. We do not, consequently, deal with the issues concerning the trial court's remarks to the jury on voir dire and the alleged improper cross-examination of

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[3] Moreover, had such a stipulation been signed by the State Attotney General of Tennessee or at his direction, the document would be merely persuasive and not controlling on the question of exhaustion of available state remedies.

[4] Section 2254 of Title 28 requires that (b) "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented."

Lewis, involving Hodges. *Huffman v. Tollett*, 321 F. Supp. 58 (E.D. Tenn. 1970); c.f. *Simmons v. Bomar*, 224 F. Supp. 633 (M.D. Tenn. 1964).

The only remaining issue petitioners have set forth in this federal habeas corpus application with which this Court is now concerned is the one dealing with the failure of the jury to specify the degree of murder in their verdicts. The other grounds for federal habeas corpus are dismissed without prejudice awaiting a prior
[fol. 4] state court determination.

Respondent is ordered to show cause why the petitioner for a writ of habeas corpus should not be granted solely on the issue that the jury allegedly failed to specify the degree of murder in the verdicts.

This 15th day of November, 1973.

/s/ Harry W. Wellford
UNITED STATES DISTRICT COURT JUDGE

APPENDIX E

[fol. 1] **No. 74-1753**

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RONALD RAY SMITH,
Petitioner-Appellant,

v.

JAMES ROSE, Warden
Tennessee State Penitentiary,
Respondent-Appellee.

FILED
NOV 15 1974
JOHN P. HEHMAN,
Clerk

ORDER

Before: WEICK and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

This is an appeal from the denial of a petition for a writ of habeas corpus by Judge Morton. Appellant was convicted of first degree murder in a Tennessee state court and sentenced to the electric chair. After the decision of the Supreme Court of the United States in *Furman v. Georgia*, 408 U.S. 238 (1972), holding the death penalty unconstitutional, the Court of Criminal Appeals of Tennessee remanded the case to the trial court for resentencing. About this same time the Governor of Tennessee commuted the sentence to 99 years imprisonment.
The Tennessee Criminal Court of Appeals then
[fol. 2] vacated its remand order. This, therefore, caused the appellant to receive a 99-year sentence.

In his habeas corpus petition the appellant challenges the procedure on the ground that his due process and equal

protection rights were denied by the combined action of the Governor and the Tennessee Court of Crimonal Appeals.

Upon full consideration, we find that no federal constitutional issue is involved and that the judgment of the district court dismissing the habeas petition should be affirmed.

We have examined the two other issues raised by the appellant but we find them to be without merit.

AFFIRMED.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

APPENDIX F

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

RONALD RAY SMITH

vs.

JAMES H. ROSE, Warden, Tennessee State Penitentiary

RECEIVED FOR ENTRY
2:10 P. M.
MAR 4 1974
BRANDON LEWIS, Clerk
/s/ M. Greer, D.C.

Civil Action No. 7181

MEMORANDUM

The petitioner, Ronald Ray Smith, filed an application for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254, alleging that he is in state custody in violation of the rights insured him under the Constitution of the United States.

The petition asserts three alleged violations, to-wit: (1) he was denied a fair and impartial trial by the effect of a "warm-up charge" given by the judge to the jury prior to the voir dire coupled with closing inflamatory remarks by the state's attorney in the closing summation to the jury; (2) twenty-nine jurors were arbitrarily excluded from the jury; (3) the commutation by the governor of the State of Tennessee of petitioner's sentence from death by electrocution to 99 years violated petitioner's right to have the jury fix his punishment in accordance with T.C.A. § 39-2406.

The matter was set for oral argument at which time the parties agreed that it was not necessary to have an

evidentiary hearing, but the facts could be agreed and stipulated in open court.

As to the fair trial contention of the petitioner, it is his assertion that a charge or statement made by the trial judge to the prospective members of the jury prior to the voir dire, a copy of which is attached to this
[fol. 2] memorandum as Exhibit A, coupled with remarks of the state's attorney in his final summation to the jury, were so highly inflammatory that his right to a fair trial assured him under the Fourteenth Amendment was patently violated. The remarks of the prosecutor in his final summation were, "We don't want to turn Williamson County into a dumping ground for dead bodies."

The remarks of the state's attorney were assigned as error in the appeal by the petitioner taken to the Court of Criminal Appeals for the State of Tennessee. However, the so-called warm-up charge was not assigned as error and the theory that the warm-up charge coupled with the remarks of the state's attorney deprived the plaintiff of a fair trial has not been passed upon by a Tennessee appellate court. Therefore, this court holds that as to this ground there has not been an exhaustion of state remedies. 28 U.S.C. § 2254.

As to the other two claims which will be discussed hereinafter, the court holds that these have been squarely presented to the appellate courts and it would be futile to require any further action of a post-conviction nature, and thus this court holds that there has been exhaustion of remedies.

As to the question of the arbitrary exclusion of twenty-nine jurors from the jury, the parties agreed in open court

that the twenty-nine jurors challenged for cause stated that they would not, under any circumstances, consider the death penalty in a criminal case. No question was raised that the voir dire was conducted in violation of ***Witherspoon v. Illinois***, 391 U.S. 510 (1968). The thrust of the plaintiff's argument is that ***Furman v. Georgia***, 408 U.S. 238 (1972) makes ***Witherspoon*** no longer viable law. Petitioner asserts that an up-to-date examination should be made of ***Witherspoon*** in light of the comments made in ***Furman***, dealing with the nonacceptance of the death penalty.

[fol. 3] Based on the teachings of ***Witherspoon v. Illinois***, ***supra***, which this court feels is still viable and effective, this contention is denied.

The third contention that the petitioner was denied his constitutional right to a jury trial under the Sixth Amendment and equal protection under the Fourteenth Amendment by reason of the commutation of the death sentence by the governor of the State of Tennessee, is the ground on which petitioner takes his primary stand.

The petitioner was convicted of murder in the first degree in a jury trial in Williamson County, Tennessee. The jury fixed his punishment at death by electrocution. A judgment was entered on said jury verdict, a motion for new trial was filed and denied, and an appeal taken to the Court of Criminal Appeals for the State of Tennessee. During the course of the appeal, the case of ***Furman v. Georgia***, ***supra***, was decided by the Supreme Court of the United States. After examination of the record, the Court of Criminal Appeals affirmed the verdict of guilty, but held that there should be a remand to the trial court for a further sentencing of the defendant pursuant to the decision in ***Furman***. However, a petition

to rehear was filed by the State in which the decision of the Supreme Court of Tennessee in the case of ***Bowen v. State***, 488 S.W.2d 373 (1972) and the fact that the governor had commuted the sentence of the defendant from death by electrocution to a term of 99 years were called to the attention of the Court of Criminal Appeals. Thereafter, the Court of Criminal Appeals held that the remand for sentencing was no longer necessary, and vacated that portion of its previous order, stating, "Smith's conviction for first degree murder and punishment of 99 years in the penitentiary is affirmed."

[fol. 4] The petitioner asserts that an appeal from the judgment rendered by the Criminal Court of Williamson County to the Court of Criminal Appeals vacated the judgment until final decision in the case and therefore at the time of the commutation by the governor there existed no valid sentence. In the alternative, petitioner asserts that the decision of the Supreme Court in *Furman* made void the sentence of death and that there was no sentence in existence for the governor to commute.

The State of Tennessee in the case of ***Bowen v. State***, ***supra***, decided both of those questions adversely to the petitioner and specifically ruled that a commutation by the governor under circumstances basically similar to those that exist in the petitioner's cause was valid.

It is true that T.C.A. § 39-2406 provides that a jury shall, in addition to determining guilt, fix the punishment of a defendant. The interpretation of this statute is peculiarly within the jurisdiction of the State of Tennessee acting through its judicial bodies. The Sixth Amendment to the Constitution of the United States guarantees a trial by jury but does not guarantee a sentence by a jury. Basically this court is unable to ascertain any federal question raised

by the petitioner and is unable to find any federal constitutional rights of the petitioner which were violated in the interpretation of the laws of the State of Tennessee by the Supreme Court of Tennessee.

The basic procedures followed in this case have been approved in the case of ***Eaton v. Capps***, 480 F.2d 1021 (5th Cir. 1973). See the compilation of cases referred to in said opinion. ***See also Sellers v. Beto***, No. 28,003 (5th Cir., Sept. 6, 1972), a copy of which appears in the file as Exhibit A to respondent's brief of October 4, 1973.

[fol. 5] There are no facts in the record which indicate any equal protection violation under the Constitution of the United States. Therefore, it is the judgment of this court that the petition must be dismissed.

/s/ L. Clure Morton
United States District Judge

[fol. 1] **EXHIBIT "A"**

"THE COURT: Now Ladies and Gentlemen, you are summonsed here for the other case, may I state this, this morning I had a man come in my office and say look at my viewpoint on this and I said well look at my viewpoint because I want to see whether Williamson County can handle its own affairs. I know there has been some publicity about this case, I do not think there has been any that would necessarily disqualify Jurors. I will say this, this will be a guarded Jury. The case may last for several days, I don't know how long it will last. I will say that you will be well cared for if you are accepted, we

will keep you as comfortable as possible. At the present time not having facilities at the jail and it looks like we won't have even with the new one when its built, we keep Jurors in the Holiday Inn overnight; we will feed you as well as we can within the limits allowed and that should be sufficient; it will be more than I eat, I'll put it that way, but as I say, you will be kept as comfortable as possible. Now I'm going to offer one other thing, anyone who serves on this Jury will be excused from further Jury Service for two years whether you are on the regular Jury or not. Now the case we are going to take up is State of Tennessee v. Ronald Ray Smith and William J. Schutt, S c h u t t, who are charged with the murder of one Robert W. Hershey, H e r s h e y. You will be questioned individually among other things about whether you are related to either of those parties when you are called. I think we will however, and while we were in the room there we were not wasting time, we were trying to get on a plan of campaign to get this case tried and tried as quickly as possible. We will have to question you individually and so I'm going to ask all jurors, all veniremen who are summonsed here to step out of the Courtroom and you will be called one at a time. Those I might state who are working in town, I see Mr. Cawthorn for instance and I know he did call me, I see no reason why you couldn't go back to your office if you leave word, if you are working close here, if you will leave word with the Officers where to get you. We want to make it as easy on you as possible but we have a job to do and we want to do that
[fol. 2] and do it right and according to law. Now ladies and gentlemen I have had many calls, yesterday was on Sunday and I had them, Saturday I almost had to leave home. I was in my office twenty minutes this morning before I was able to look at one of my own affairs for people coming in asking outside excuses. I told every one the same thing and for the last four years

and three or four months I have told everyone the same thing, the selection of a Jury is a matter to be done in open Court, it is not to be done over the telephone, it is not to be done in my private office, it is a matter in the Courtroom in here, for that reason, I haven't excused no one, some of them had wonderful reasons I'll say that but I haven't excused any outside of the trial. I will ask you, I will try to cooperate with you because I want to make it as little a hardship as possible I will try to cooperate with you in every way that I can but I want to ask you if you do not have a real valid excuse try not to insist on it."

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APPENDIX G

[fol. 1]

NO. 74-1087

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRED J. BOWEN
Petitioner-Appellant

vs.

JIMMY H. ROSE, Warden
Respondent-Appellee

FILED
MAR 12 1974
JAMES A. HIGGINS,
Clerk

ORDER

Before: EDWARDS, PECK and ENGEL, Circuit Judges.

This appeal was referred by the Chief Judge to a panel pursuant to Rule 3(e) of the Rules of the Sixth Circuit.

On consideration of the record in this case, and it appearing to the court that the order of dismissal entered by the District Court was correct for the reasons stated therein by the Honorable Frank Gray, Jr., Chief Judge, and it appearing therefore that the appeal is frivolous and entirely without merit,

It is Ordered that the same be and it is hereby dismissed pursuant to Rule 9 of the Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk

APPENDIX H

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

FRED J. BOWEN

VS.

JIMMY H. ROSE, Warden,
Tennessee State Penitentiary

RECEIVED FOR ENTRY
3:20 P.M.
NOV 27 1973
BRANDON LEWIS, Clerk
By /s/ M. Greer, D.C.
Civil No. 7271

ORDER

The clerk will file the petition of Fred J. Bowen for the writ of habeas corpus in forma pauperis.

Petitioner asserts that, in some unnamed manner, his rights were violated by police when he was taken into custody in connection with the offense of which he was later convicted. He also asserts that he was convicted of murder and sentenced to death and that, subsequently, the Governor of Tennessee commuted his sentence from death to imprisonment for ninety-nine years following the decision of the United States Supreme Court with reference to death sentences.

[fol. 2] This court is of the opinion that the action of the Governor of Tennessee, taken under State law, in commuting his sentence does not present any Federal question; and, in the absence of any specificity on the general charge that his rights were violated

by the police, the court is of the opinion it is without merit. Accordingly, it is DENIED and the action DISMISSED.

/s/ Frank Gray, Jr.
CHIEF JUDGE